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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
TIFFANY MARIE GIPSON,
Defendant and Appellant.

A143901, A144555
(Napa County
Super. Ct. No. CR163061)

On April 8, 2015, we ordered the above-captioned appeals consolidated. We set forth the separate facts and procedural history of the two appeals below.

Case No. 143901

On the evening of August 18, 2012, Garrett Ojala was working plain clothes security at the Walmart store in American Canyon, looking for potential shoplifters, when he observed appellant Tiffany Marie Gipson and a man later identified as Earl Baker looking at carseats in the infants' section of the store.¹ Ojala, who described the carseats as "high theft" items at the store, watched Gipson and Baker select a carseat and put it in their shopping cart.

Gipson pushed the shopping cart to another aisle, where she and Baker opened the box the carseat was in and placed the seat on top of the shopping cart, "like where the kids sit," and then Gipson took a baby blanket from one of the store shelves and placed it

¹ The facts of the underlying offenses are based on evidence produced at the preliminary hearing, which provided the factual basis for Gipson's plea.

over the carseat. Gipson and Baker eventually walked towards the checkstand, where they split up. Gipson pushed the cart to the cash register, where she paid for the items in the cart, except for the carseat, which was still underneath the blanket. Ojala saw Gipson get her receipt and then walk towards the store exit, where he and other security officers stopped her. Ojala asked Gipson if she knew why he was stopping her, and “[s]he told me the carseat.” Ojala brought her to his office and notified the police.

Napa County Deputy Sheriff Osvaldo Hernandez was on patrol in American Canyon when he was dispatched to the Walmart store, where he met with Ojala and Gipson around 9:00 p.m. Hernandez advised Gipson of her *Miranda* rights, and she agreed to speak with him. She admitted she knew the blanket and carseat were in her shopping cart and that she intentionally did not pay for them. Gipson told Hernandez she took the items because she was pregnant and wanted to save money.

On February 19, 2014, the Napa County District Attorney filed a one-count felony information charging Gipson with violating former Penal Code section 666, subdivision (b),² petty theft with “priors.” The information charged Gipson with one prior strike conviction, pursuant to section 667, subdivisions (b)-(i), and one prior prison term enhancement, pursuant to section 667.5, subdivision (b). On February 24, 2014, Gipson was arraigned, pleaded not guilty, and denied the special allegations.

On October 17, 2014, pursuant to a negotiated disposition, Gipson entered a plea of no contest to the offense charged in count one of the information. Among the terms of that disposition were that the special allegations would be dismissed and that Gipson would be sentenced to the midterm of two years in state prison, which would run concurrently with a term of imprisonment she was already serving in a Solano County case. As part of the plea agreement, Gipson waived her right to resentencing or the reduction of her conviction from a felony to a misdemeanor, should Proposition 47 be enacted by the electorate on the November 2014 statewide ballot, and she waived her

² All statutory references are to the Penal Code.

right to appeal. Pursuant to the plea agreement, the court granted the prosecution's motion to dismiss the special allegations.

Sentencing occurred on November 14, 2014, after the electorate's passage of Proposition 47,³ and at the hearing, defense counsel argued the case should be disposed of as a misdemeanor, which the prosecutor disputed. The court noted the "legal issue" and continued the matter.

At a further hearing on December 2, 2014, the court ordered briefing on the defense contention that the plea agreement was illegal. The defense and the prosecution filed written arguments; the defense asked the trial court either to impose a concurrent misdemeanor sentence or to permit Gipson to withdraw her plea, while the prosecution urged the court to enforce the plea agreement.

On December 19, 2014, the trial court denied the defense motion. It sentenced Gipson to the midterm of two years in state prison, to be served concurrently with her four-year sentence in Solano County Superior Court case No. VCR220399. The court ordered Gipson to pay a \$300 restitution fine pursuant to section 1202.04 and an additional \$300 restitution fine pursuant to section 1202.45 (which was suspended unless parole is revoked), a \$40 court security fee, and a \$30 criminal conviction assessment fee.

On December 29, 2014, Gipson filed a notice of appeal from the judgment and sentence entered on December 19, 2014. The record contains no request for a certificate of probable cause.

Case No. 144555

On December 24, 2014, Ms. Gipson filed a petition to recall her sentence and request for resentencing, pursuant to Proposition 47 and section 1170.18, subdivision (a). On January 15, 2015, the trial court denied the petition, stating that "this was a distinctive case because there was a plea bargain where by [*sic*] both sides gave up something prior

³ "On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act . . . , which went into effect the next day." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) The effect of Proposition 47 was to make "certain drug- and theft-related offenses misdemeanors[.]" (*Id.* at p. 1091.)

to the passage of Prop 47 and the agreement reached here,” referring to the plea agreement and prior proceedings in this matter.

On March 10, 2015, Gipson filed a notice of appeal from the order denying her petition for resentencing on January 15, 2015.

On September 15, 2015, appointed counsel submitted a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, certifying that he has been unable to identify any issues for appellate review. Counsel has also submitted a declaration affirming that he has advised Gipson of her right to file a supplemental brief raising any points which she wishes to call to the court’s attention. No supplemental brief has been submitted.

DISCUSSION

As required, we have independently reviewed the entire record and found no arguable issues. (*People v. Kelly* (2006) 40 Cal.4th 106, 109-110.) Gipson’s principal contention below was that notwithstanding her plea agreement, she should have been sentenced to a misdemeanor, because under Proposition 47, the offense to which she pleaded no contest is now a misdemeanor. Not so. Her plea agreement explicitly waived her right to resentencing or reduction should Proposition 47 pass. By entering into a negotiated plea agreement, defendants may validly waive *existing* statutory rights. (See, e.g., *People v. Shelton* (2006) 37 Cal.4th 759, 768-769 [waiver of multiple punishment prohibition of § 654]; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1659 [statutory right to appeal].) It necessarily follows that defendants may also waive rights that might later come into existence as a result of a change in the law. (See *Doe v. Harris* (2013) 57 Cal.4th 64, 70 [“the parties to a plea agreement . . . are deemed to know and understand that the state . . . may enact laws that will affect the consequences attending the conviction entered upon the plea”].)

Although we find no arguable issues, there are two reasons that preclude us from reaching any matters Gipson might have raised in case No. 143901. First, her plea agreement includes a waiver of her right to appeal. This precludes review of any error occurring prior to the waiver. (*In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1157.)

Under section 1237.5, no appeal may be taken from a judgment of conviction upon a plea of guilty or nolo contendere unless: (1) “[t]he defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings[,]” and (2) “[t]he trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.” (§ 1237.5, subds. (a), (b).) California Rules of Court, rule 8.304(b)(1)⁴ implements section 1237.5 by stating, “Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court with the notice of appeal required by (a)—the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause.”

A defendant may not obtain review of issues requiring a certificate of probable cause unless she has complied with section 1237.5 and rule 8.304(b)(1) “fully, and, specifically, in a timely fashion—that is to say, unless [s]he has done what they require, how they require, and when they require.” (*People v. Mendez* (1999) 19 Cal.4th 1084, 1099 [construing predecessor to rule 8.304(b)(1)].) In the absence of such compliance, the appeal is not “operative” and the reviewing court must dismiss it. (*Id.* at pp. 1095, 1096.) We may not overlook this deficiency and grant relief from default. (See *id.* at p. 1098.)

As stated, we have independently reviewed the record. (*People v. Kelly, supra*, 40 Cal.4th at pp. 109-110.) While we have found no arguable issues, because Gipson pleaded no contest to the charge, any issues she might have raised would have required a certificate of probable cause in any event. (§ 1237.5.) This includes any challenge to the denial of her motion to withdraw her guilty plea. (*People v. Johnson* (2009) 47 Cal.4th 668, 679.) Only with a certificate of probable cause could Gipson pursue an appeal challenging the imposition of her stipulated sentence. “A certificate of probable cause is not required if the issue on appeal arose after the entry of the plea and does not affect the

⁴ All rule references are to the California Rules of Court.

validity of the plea.” (*People v. Vargas* (2007) 148 Cal.App.4th 644, 651.) “[I]f the defendant agreed to a specific sentence as part of his plea agreement the sentence is an issue that arose before entry of the guilty plea, and in order to challenge that sentence on appeal, the defendant must obtain a certificate of probable cause.” (*Id.* at p. 652.)

Our Supreme Court has admonished that the requirements of section 1237.5 and rule 304(b)(1) “should be applied in a strict manner.” (*People v. Mendez, supra*, 19 Cal.4th at p. 1098 [construing predecessor to rule 304(b)(1)].) Because Gipson has not complied with these provisions, we “may not proceed to the merits of the appeal, but must order dismissal thereof[.]” (*Id.* at p. 1096.) Her noncompliance with these procedures deprives us of jurisdiction over case No. 143901, and accordingly we will order that appeal dismissed. (*Ibid.*)

We have also reviewed the record in case No. 144555 and have found no arguable issues. (*People v. Kelly, supra*, 40 Cal.4th at pp. 109-110.) Gipson entered into a plea agreement in which she waived her right to resentencing or to a reduction in sentence should Proposition 47 pass. As noted above, a defendant may validly waive otherwise available statutory rights as part of a plea agreement. Moreover, Gipson’s acceptance of the plea bargain was an explicit waiver of any rights she would have had under the later-enacted Proposition 47. (See *People v. Hester* (2000) 22 Cal.4th 290, 295 [acceptance of plea bargain was implicit waiver of rights under § 654].) “ ‘When a defendant maintains that the trial court’s sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.’ ” (*Ibid.*)

DISPOSITION

Case No. 143901 is dismissed. In case No. 144555, the judgment is affirmed.

Jones, P.J.

We concur:

Needham, J.

Bruiniers, J.

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